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THE DIVISION OF POWERS BETWEEN THE EUROPEAN COURT OF JUSTICE AND NATIONAL COURTS: A CRITICAL LOOK AT INTERPRETATION AND APPLICATION IN THE PRELIMINARY REFERENCE PROCEDURE*

CONTENTS

1. Introduction
2. The Judicialisation of Politics and the Role of Courts in the Community
3. Interpretation and Application in the Preliminary Reference Procedure
4. The Court of Justice's Approach
5. The Desire for Uniformity
6. Consequences: Centralisation, Alienation and Judicial Overload
7. Cultural Origins
8. Regulatory Competition between Legal Systems
9. Reference v Appeals
10. Conclusion

1. INTRODUCTION

Community law is enforced by two sets of courts; those of the Member States, and those of the Community. The rhetoric surrounding this is of co-operation. Nevertheless, any sharing of function is also a sharing of power, and unless the boundaries are permanently fixed, there will also be the potential for competition. That may be more apparent, and more discussed, in the context of the other organs of government; the two sets of civil servants, in national ministries and the Commission, the two sets of parliamentarians, and the cabinet-like Council and its national equivalents. However, it is also true of courts.

It is true that courts are different: unlike other organs, they do not directly reflect the current will of government or parliament, and this means that the division of powers between them is less obviously a democratic or political issue. However, in a careful sense of both those words it clearly is. Courts reflect the societies in which they sit, and are formed by them. They are another branch of democracy, another way of reflecting the people, and, of course, all power is political.

As a consequence, courts have a dual role in the allocation of competences in the Community. They adjudicate it, but they are also an important part of it. They must decide, but they must also decide whether they should decide. This paper focuses on how the Court of Justice does the second of these things. It does this through an examination of the Court's behaviour during the preliminary reference procedure. It asks how the Court interprets its own function in that procedure, and its relationship with national courts, and so in turn their function. The emphasis is on

* Gareth Davies, Faculty of Law, University of Groningen, Netherlands. This paper was written for a conference in April 2004 at the University of Edinburgh on 'Regulating the Internal Market', organized by Niamh Nic Schuibne. A revised and extended version will appear in the conference book, to be published by Edward Elgar in 2005. I am very grateful to Bibianne Bon for discussion of many relevant issues, and help with research. Faults remain of course my own.

whether the Court is right to take such an extensive view of its own competences, and in particular to delve into the facts of cases as much as it does, or whether it would be better for it to take a more abstract approach and leave more work for its national peers.

These questions are asked for a number of reasons. In part there is the desire to study an emerging Community legal system, and its character, and to see what and how much it owes to the Member States legal systems, and in particular the common and civil law traditions and concepts of law and judging. However, there is also the more practical concern to understand the consequences of different ways of interpreting Article 234, both for the legal systems and courts involved, and for the Community policies that they are called upon to adjudicate.

Both of these are given impetus by the surprising absence of scholarship concerning these points.¹ Perhaps for black-letter lawyers, used to examining judgments on their own terms, criticizing what they say or do not say, the question of whether they should be there at all seems unrealistic, and so of marginal importance, too theoretical, and even subversive or disrespectful. On the other hand, for political scientists, such meta-questions are interesting, but not always accessible. The argument in this paper is not built on the leading constitutional judgments, that are well-known even outside legal circles, but on sometimes mundane rulings in diverse policy areas, and the consistent patterns that emerge. These will only be apparent to the writer for whom these are his or her daily texts.

After this introduction, the next section looks at the characteristics of the Community that give courts a prominent role, and argues that their potential freedom and power is far more than is customary within Member States. Hence the need to consider how that power will be divided up. The third section of the paper then outlines the relevant aspects of the preliminary reference procedure itself, and in particular the distinction between interpretation and application of the law. This is followed by a discussion, with reference to case law from the internal market, of how the Court interprets that distinction. Subsequent parts analyse the Court's behaviour. First, why has it chosen for an interventionist interpretative path limiting the freedom of national courts and extending its own? The classical answer, its desire for uniformity of Community law is critically examined. Second, how much does it owe to tradition? It seems to display a very common law understanding of the law, and yet the reference procedure owes much to continental European systems. Both sides of this create problems. The common law is labour intensive, and demands decentralization of interpretative creativity. Resisting this, the Court of Justice creates a workload it cannot cope with. From the other side, the classically continental reference procedure is coherent where the higher court has competence to interpret all the laws that come before it. Lacking that, it court can not fully answer questions of conflicts of laws; yet that is what the Court of Justice, despite a lack of competence to interpret national law, insists it must do.

Following this, a parallel is drawn between issues here and those surrounding regulatory competition. It suggests that as with its legislative competence, the Community attempts to define its powers in both an ambiguous and an extensive way, giving it the option of centralization, even if that option is not always exercised. It is

¹ Although see J.Snell 'European Courts and Intellectual Property: A Tale of Hercules, Zeus and Cyclops' (2004) *European Law Review* 178-197, and J.C.Cohen 'The European preliminary reference and U.S. Supreme Court review of state court judgments: a study in comparative judicial federalism' (1996) 44 *American Journal of Comparative Law* 421. Many other writers refer in a line to the questions raised here, without going further. They tend to broadly approve the Court's approach.

argued that this is inefficient, and creates an adjudicative system poorly adapted to a large and dynamic market. As with legislation, the risk of some loss of uniformity is more than outweighed by the huge waste of national resources entailed in infantilizing and marginalizing the role of national courts in interpreting Community law. Finally, in the last section before the conclusion, it is suggested that recasting the Court of Justice as the appeals court it almost is would solve some problems.

2. THE JUDICIALISATION OF POLITICS AND THE ROLE OF COURTS IN THE COMMUNITY

A fractious society creates irresolvable, constantly changing and dynamic questions. Consensus, where it exists, is often short lived and fragile. This requires similarly flexible and adaptable norms - interpretation is a faster, more subtle tool than legislation, as well as being perhaps more safely insulated from waves of populism – and a consequence is that the judiciary takes a greater role in the great political questions of the time. This is most evident in the United States, where the Supreme Court is one of the leading actors in that society's self-formation.

Three important elements in allowing such judicialisation to occur are the presence of a directly effective, legally enforceable constitution, precedent, and an explanatory and well-argued style of judgment. The first creates a basis for annulment of acts of public authorities, even of the legislator, and so creates a stage for direct conflict, for a battle of wills. Admittedly, interpretation without annulment can also be a powerful tool, but at least in the public perception it is likely to be less dramatic or controversial – there is no contest, but merely a legal point likely to be inaccessible to most. Moreover, constitutions typically contain rights and principles that are broad and open to debate – thus they effectively give a wide discretion to courts to challenge the legislator. They create a true opponent.

Yet the battle is not the war, and while a decision in a specific case may have repercussions, few case-outcomes are in themselves enough to change the course of a society. No single law or individual, or group, is that essential. However, when the reasoning behind a decision is fully argued and laid out, and when that decision is binding on courts in the future, then the court does not just decide the case, but lays down a new rule for the future. Its judgment is then more far-reaching, and as a court builds up a body of such judicial legislation it does develop the power to steer the land.²

All these three elements have emerged in the European Union. The authority assumed by the Court of Justice to – effectively, in conjunction with national courts – annul national acts is well-known. Less often considered is the way the Court has developed a semi-discursive style of judgment, in which it not only lays down general principles to be followed in the future, but also provides reasons for these, and roots them in previous decisions. This legitimates the principles as new quasi-laws, and encourages national courts to accept them.³

² See generally J.Vining *The Authoritative and the Authoritarian* (University of Chicago Press, 1986) cited in Weiler, 'The judicial apres Nice', in G.De Burca and J.H.H.Weiler (eds.) *The European Court of Justice* (OUP 2001), at 215-226; Lasser 'Anticipating three models of judicial control, debate and legitimacy: the European Court of Justice, the Cour de cassation, and the United States Supreme Court', Jean Monnet Working Paper 1/03.

³ Although Weiler argues that the Court is still too Cartesian and cryptic, and needs to go further in the common law direction. See J.H.H.Weiler 'The judicial apres Nice', op cit, at 225. See also Lasser, op cit, at 36-53. On the Court's development of precedent see note 86 below.

In fact, the potential power of courts in the Community legal order arguably goes beyond anything to be found in individual Member States. The language of the Treaties notoriously leaves ample room for interpretation. This is partly a function of their relative brevity, given the size of the tasks they delimit, but also of their purposive nature. Interpreting with a view to ends which are in themselves disputable adds a further level of ambiguity to already open-textured law.

This makes it perhaps strange that during the recent intense focus on a clearer and better division of powers little attention has been given to how the Court of Justice performs its tasks. Emphasis was instead on the description of Community powers as a way of containing them, and on supervision of subsidiarity; another indeterminate idea.⁴ Yet this creates at best an incomplete strategy. Concepts such as free movement and fair competition, even less a clean environment or a high level of consumer protection, can only be described in precise terms at the cost of excluding what are ongoing and important social dialogues about what such things are or should be. Working with living and changing concepts means having imprecise law.⁵ Thus rather than looking at the texts, a better, or at least a necessary additional, source of predictability and legal certainty is the behaviour of the courts who read them. If this follows accepted and known norms, then while the law may change, it does so in an understandable way.

3. INTERPRETATION AND APPLICATION IN THE PRELIMINARY REFERENCE PROCEDURE

Certain types of legal action are reserved to the European Court of Justice, and national courts play no role. Here there is little to discuss concerning division of functions. That issue becomes important only in the context of preliminary references, which avoid a simple hierarchical relationship between courts, such as between deciding court and court of appeal, in favour of a co-operative sharing out of the various activities necessary to decide a case.⁶

Article 234 EC provides that national courts may refer a question concerning the interpretation of the Treaty to the Court of Justice. The Court of Justice has limited this right to circumstances in which the answer to that question is necessary to decide a case currently before the national court. This idea of sending a question to another court has its origins in continental legal systems. A number of these have courts which are empowered to answer questions, often on the constitutionality of lower laws, but do not formally decide the case. There is also a similarity with courts of cassation. These are appeal courts, but once again they do not decide the case, but merely consider whether the lower court has correctly used the law. If they find it has not, they refer the case to be re-decided by the lower court, or another court of that level. They do not provide a replacement judgment.

In both these cases there is a distinction made between interpreting and applying, or between law and fact. The higher body considers and interprets legal matters, but does not determine matters of fact, nor does it apply the law to the facts, which functions it leaves to the referring court, which decides the case and issues the operative judgment. This distinction also operates in Community law, and has been

⁴ See G.Davies 'The post-Laeken division of competences' (2003) 28 *European Law Review* 686-699.

⁵ See S.Weatherill 'Competence' in B. de Witte (ed) *Ten Reflections on the Constitutional Treaty for Europe* (Robert Schuman Centre for Advanced Studies, 2003). An e-book, available via www.iue.it/RSCAS at 45-67.

⁶ Or a 'separation' of functions - Case C-30/93 *AC-ATEL Electronics* [1994] I-2305.

expressed and repeated by the Court of Justice. It has jurisdiction to interpret the Treaties, it often emphasises, but not to apply that interpretation to the facts in the case, which task is the exclusive competence of the national referring court. Nevertheless, it remains far from obvious what this formula means, and what the difference between interpretation and application is.⁷

Interpretation could be understood in an abstract sense. Then interpretations of Article 28 would include the famous proposition in *Dassonville*,⁸ as well as the finding in *Cassis de Dijon*⁹ that the application of formally equal national standards can be contrary to that article if disproportionate, and the suggestion in *Keck*¹⁰ that rules having no difference in their effect on imports and national goods are outside of Article 28 altogether.¹¹ Application, the task of the national court, would then consist in applying these principles to the case – asking whether on the facts before them the national measure is proportionate, or whether it has an unequal effect on national and imported goods.

However, interpretation can also be understood to go a great deal further. It could be understood to include assessment of the facts in the light of the law.¹² Thus the concrete finding that the rule on alcohol levels under consideration in *Cassis* (or a rule of that form) is in fact disproportionate, or the finding in *Keck* that selling arrangements are in fact generally rules of equal effect, can also be seen as an interpretation of the Treaty in the particular case. On this reading, the application task left over to the national court is a mechanical, residual one. It is reduced to a primary fact-finder but with even that function limited, since certain factual questions – such as whether consumers may be confused – may be essentially redefined as questions of Community law, for the Court of Justice. Under such a view of interpretation, it could be said that Community law includes a degree of a priori fact finding.¹³

4. THE COURT OF JUSTICE'S APPROACH

The Court of Justice is quite consistent in its doctrine; application is for the national court, the only one competent to assess the facts, and the legality or proportionality of the particular national measure; “the court has no jurisdiction either to apply the Treaty to a specific case, or to decide upon the validity of a provision of domestic law

⁷ See generally F.Dumon *The Case-law of the Court of Justice – a critical examination of the methods of interpretation* (Europa Instituut: Luxembourg, 1976); See L.Neville Brown and T.Kennedy *The Court of Justice of the European Communities* (Sweet and Maxwell, 5th edn. 2000); D.N. MacCormick and R.S. Summers, *Interpreting precedents, a comparative study* (Dartmouth Publishing, 1997).

⁸ “All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions”. Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

⁹ Case 120/78 *Cassis de Dijon* [1979] ECR 649.

¹⁰ Cases 267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

¹¹ See S.Enchelmaier ‘The awkward selling of a good idea, or a traditionalist interpretation of Keck’ in (2003) 22 *Yearbook of European Law* 249-322.

¹² C.f. ‘qualification’ of the facts, to use Bengoetxea, MacCormick and Soriano’s term. See J.Bongoetxea, N.MacCormick, L.M.Soriano ‘Integration and integrity in the legal reasoning of the European Court of Justice’ in G.De Burca and J.H.H.Weiler (eds.) op cit, 43-86 at 60. They distinguish between finding fact, which is for the national court, and qualifying it, which is law, and for the Court of Justice. That distinction is certainly imaginable – see the next section – but it is here argued that it is neither inevitable nor fully coherent – qualification can also be seen as part of fact-finding. There are no neutral data.

¹³ A quality it shares with medieval theology.

in relation to the Treaty”¹⁴; “it is for national courts alone to apply the provisions of Community law so interpreted, taking into account the circumstances of fact and law in the case which has come before it. No such application is possible without a comprehensive appraisal of the facts of the case”¹⁵; “Article 177 ... does not give the Court jurisdiction to take cognizance of the facts of the case”;¹⁶ Yet at the same time, the Court will reject questions that do not provide sufficient factual information, and emphasizes that it can only deal with references where the context is made very clear.¹⁷ Moreover, it is well-known that it often delivers judgments so specific that the case is effectively decided, in which it rules unambiguously on matters of fact.¹⁸

This does seem to disclose some flexibility of approach, which is deserving of analysis in itself.¹⁹ However the examples below show what perhaps does not need to be shown – that when it wants to the Court considers itself quite competent to engage with the facts, and take a very broad view of interpretation indeed.²⁰

4.1 Free Movement

The most startling and consistent specificity comes in the application of the free movement articles, notably those governing goods and services. The abstract principles developed by the Court in this area are really quite simple, and could be summed up in a few paragraphs, but the considerable and growing body of case law is

¹⁴ Case 6/64 *Costa v Enel* [1964] ECR 585.

¹⁵ Case C-320/88 *Staatsecretaris van Financien v Shipping and Forwarding Enterprise Safe BV* [1990] ECR I-285.

¹⁶ Case 13/68, *Salgoil Spa. v. Ministero per il Commercio con l'Estero*, [1968] ECR. 453.

¹⁷ See Joined Cases C-320-322/90 *Telmarsicabruzzo* [1993] ECR I-393; also Case 104/79 *Foglia I* [1980] ECR 745 and Rasmussen ‘Remedying the crumbling EC judicial system’ (2000) 37 *Common Market Law Review* 1071-1112 at 1102.

¹⁸ Apparently in more than 2/3 of references; Rasmussen, op cit, at 1101. See also J.C.Cohen ‘The European preliminary reference and U.S. Supreme Court review of state court judgments: a study in comparative judicial federalism’ (1996) 44 *American Journal of Comparative Law* 421 at 429-430; Mancini, ‘From CILFIT to ERT: the constitutional challenge facing the European Court’ (1991) *YEL* 1-13, quoted in Rasmussen.

¹⁹ The question of consistency is not so interesting here; a power to interpret the facts does not necessarily entail an obligation to. However, a study of why the Court chooses to be interventionist or not in particular cases would be worthwhile. See note 31 below for such studies in the context of proportionality. One might expect three factors to influence it. Most obviously, the degree of information provided in the reference will clearly affect the extent to which the Court feels able to judge the case. However, one might also expect that ‘politics’ would play a role; how important is the case, for Community law generally and for the parties and the Member State, and how controversial is it? The former would argue for intervention, the latter might make a hands-off approach attractive. Lastly, one might perhaps expect that with time the Court would move towards more abstract interpretation. Thus a new area of law might call for concrete (simple) answers, which serve as examples to national courts. With time, as they become more familiar with the law, the Court of Justice might become more comfortable with allowing the national judge greater autonomy, and so retreat to a more abstract approach. At first glance, this latter trend does not seem to be apparent. See note 62 below for references.

²⁰ Examples are from the internal market. Another area about which analogous arguments could be made is sex discrimination law. See Sean Pager ‘Strictness vs. discretion: the European Court of Justice’s variable vision of gender equality’ 51 *American Journal of Comparative Law* 553-608. In references concerning Member State liability for breaches of Community law the Court tends also to the concrete. See generally P.Craig and G.De Burca *EU Law* (OUP 3rd edn. 2003) at 472-3); Kapteyn and Verloren (ed Gormley) *Introduction to the Law of the European Communities* (Kluwer Law International, 3rd edn. 1998) 504-510; J.Steiner and L.Woods *Textbook on EC Law* (OUP 8th edn. 2003) at 548.

mainly concerned with endless specific applications of these principles, with the deciding of a repetitive stream of formally similar cases.

The most obvious example is the case law following *Cassis*. That case made clear that Article 28 forbade the use of national standards to exclude imports, unless those standards served some legitimate aim (i.e. were not merely protectionist or cost-saving) and their application to imports was proportionate – genuinely necessary for that aim, not going beyond what was necessary, and not resulting in disproportionately heavy disadvantages for the importer compared with the claimed benefits for the consumer or society in general. The overwhelming majority of cases on standards and product rules ever since have been requests for the Court of Justice to consider a particular national measure in the light of these principles. The question usually comes down to ‘is the national measure proportionate?’

Of course, proportionality can be seen as a question of Community law, and so the determination of whether a measure is proportionate as a legitimate element of interpreting that law. There are two problems with this. One is that the Court of Justice has stated in terms of varying certainty that the proportionality of national measures is a question of fact, for the national court²¹ – thereby contradicting its own practice – and the other is that this must, at least in part, be the case; any sensible assessment of whether a measure really goes beyond what is necessary, or what its effects are, requires a good factual investigation of the type that the Court of Justice is neither competent nor able to perform on a reference.²² If it attempts to, the result is often an answer that betrays a half-understanding of the factual situation, and yet no hesitation in drawing sweeping conclusions about it.²³

A vivid example is *Buet*.²⁴ A quotation, though lengthy, is worthwhile:

11 It is common ground that the French legislature adopted the prohibition of canvassing in question out of concern to protect consumers against the risk of ill-considered purchases. However, as the Court has repeatedly held (see in particular the judgment of 14 July 1988 in Case 407/85 *Glocken*) such rules must be proportionate to the goals pursued, and if a Member State has at its disposal less restrictive means of obtaining the same goals, it is under an obligation to make use of them.

12 In that respect canvassing at private dwellings exposes the potential customer to the risk of making an ill-considered purchase. To guard against that risk it is normally sufficient to ensure that purchasers have the right to cancel a contract concluded in their home.

13 It is necessary, however, to point out that there is greater risk of an ill-considered purchase when the canvassing is for enrolment for a course of instruction or the sale of educational material. The potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects. Moreover, as is apparent from the documents, it is as a result of

²¹ Case C-145/88 *Torfaen Borough Council* [1989] ECR I-3851; Case C-169/91 *Stoke on Trent City Council* [1992] ECR I-6635. See also Case C-95/01 *Greenham and Abel*, 5th February 2004; Case C-368/95 *Familiapress* [1997] ECR I-3689; Case C-312/89 *SIDEF* [1991] ECR I-997; Case C-405/98 *Gourmet International* [2001] ECR I-1795. See also notes 27 and 31 below.

²² See M.Jarvis *Application of EC law on the Free Movement of Goods by the National Courts of Member States* (PhD thesis, Groningen, 1997) at 185-189 and 211-218.

²³ *Ibid*, at 186.

²⁴ Case 382/87 *Buet v Ministère Public* [1989] ECR 1235.

numerous complaints caused by such abuses, such as the sale of out-of-date courses, that the legislature enacted the ban on canvassing at issue.

14 Finally, it needs to be stressed that since teaching is not a consumer product in daily use, an ill-considered purchase could cause the purchaser harm other than mere financial loss that could be longer lasting. Thus it has to be acknowledged that the purchase of unsuitable or low-quality material could compromise the consumer's chances of obtaining further training and thus consolidating his position on the labour market.

15 In those circumstances it is permissible for the national legislature of the Member State to consider that giving consumers a right of cancellation is not sufficient protection and that it is necessary to ban canvassing at private dwellings.

The first paragraph is interpretation. The rest is a somewhat shallow – in that without reference to evidence or counter argument - judgment on the facts. Even if the Court felt paragraph 11 alone did not give enough guidance, it could have then instructed the national court that the Treaty required it to consider all relevant characteristics, such as the particular categories of persons making a purchase, and any special circumstances attaching to the type of goods. The risk would still have been there of a different answer at national level, but such abstract guidance might have been of much more help to other courts.²⁵

Clinique follows in the same tradition.²⁶ The question referred was whether a German prohibition on the use of that name on cosmetics could be justified by the fact that the word bore a resemblance to the German word for hospital, and therefore might confuse consumers into thinking that the products had some medical value. The answer might have been ‘it could be, if it does have that effect on a reasonably cautious consumer’. Instead the Court said

16 It should also be recalled that the Court has consistently held that rules must be proportionate to the goals pursued (see, in particular, the judgment in Case 382/87 *Buet v Ministère Public* [1989] ECR 1235, paragraph 11).

17 The German legislation which transposed Article 6(2) of Directive 76/768 must in its application be consistent with Articles 30 and 36 of the Treaty, as interpreted in the Court's case-law. In order to reply to the national court's question, it is necessary to determine in the light of the criteria set out in that case-law whether Community law precludes the prohibition referred to in that question.

.....

20 In order to determine whether, in preventing a product being attributed with characteristics which it does not have, the prohibition of the use of the name "Clinique" for the marketing of cosmetic products in the Federal Republic of Germany can be justified by the objective of protecting consumers or the health of humans, it is necessary to take into account the information set out in the order of reference.

21 In particular, it is apparent from that information that the range of cosmetic products manufactured by the Estée Lauder company is sold in the Federal Republic of Germany exclusively in perfumeries and cosmetic departments of large stores, and therefore none of those products is available in pharmacies. It is not disputed that those products are

²⁵ See note 81 below.

²⁶ Case C-316/92 *Clinique Laboratoires* [1994] ECR I-317.

presented as cosmetic products and not as medicinal products. It is not suggested that, apart from the name of the products, this presentation does not comply with the rules applicable to cosmetic products. Finally, according to the very wording of the question referred, those products are ordinarily marketed in other countries under the name "Clinique" and the use of that name apparently does not mislead consumers.

22 In the light of these facts, the prohibition of the use of that name in the Federal Republic of Germany does not appear necessary to satisfy the requirements of consumer protection and the health of humans.

23 The clinical or medical connotations of the word "Clinique" are not sufficient to make that word so misleading as to justify the prohibition of its use on products marketed in the aforesaid circumstances.

What is interesting in this extract is that the Court explicitly states that in order to answer the question it must decide whether the national legislation actually contravenes Article 28. The implication is that this is what its function is.²⁷ Contrast with this statement from *Frattelli Graffione*,²⁸ also on the question of a consumer confusion;

23 However, as pointed out in paragraph 17 of this judgment, in order to be justified, the measure adopted to protect consumers must really be necessary for that purpose and proportionate to the objective pursued, which must not be capable of being achieved by measures which are less restrictive of intra-Community trade.

24 According to the case-law of the Court, the risk of misleading consumers cannot override the requirements of the free movement of goods and so justify barriers to trade, unless that risk is sufficiently serious (see to that effect, in particular, the judgments in the *Clinique* and *Mars* cases, cited above).

25 Since the documents before the Court in this case do not enable it to assess whether those conditions are satisfied here, it is for the national court to carry out that assessment.

²⁷ Contrary to the arguments of the Advocate General, supported by Advocate General Fennelly in Case 220/98 *Estee Lauder* [2000] ECR I-1117; 'I would recommend that the Court, in addition to specifying the test that is to be applied by the national court, provide guidance, along the lines suggested in the previous paragraph, regarding the factors which the latter may wish to consider in applying that test so that the national court has all the relevant material to enable it to determine whether granting the injunction in this case would be compatible with Community law. However, in doing so, it should, as Advocate General Gulmann advised in *Clinique*, not link its interpretation of Article 30 too closely to the particular facts of the case. I also agree with his view that under the system of the Treaty, [the] task of ensuring uniform application of general provisions such as those found in the 1976 Directive devolves on the national courts. Thus, notwithstanding the earlier willingness of the Court occasionally, where the evidence and information before it seemed sufficient and the solution clear, to settle [...] the issue itself rather than leaving the final decision for the national court, I am convinced that such departures from the normal division of competence between national courts and the Court of Justice in preliminary-reference cases are inappropriate and, in the light of the development at Community-law level of a test that enables the proper degree of protection of consumers to be determined by national courts, unnecessary. In cases such as that in the main proceedings, the Court should henceforth confine itself to interpreting Community law and providing guidelines for its application by the national court. The ultimate application of Community law and, thus, final decision in respect of alleged misleading or confusing product claims should be made by the national court.'

²⁸ Case C-313/94 *Frattelli Graffione* [1996] ECR I-6039.

Or this view from *Gourmet International*:²⁹

33 Second, the decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, calls for an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned, which the national court is in a better position than the Court of Justice to carry out.

Or, most principled of all, the views in *Costa v Enel* and *Shipping and Forwarding* quoted at the beginning of this section.³⁰ It seems as if the Court does not deny the essentially factual nature of proportionality assessments, it just feels that if it is comfortable with the facts such assessment is something it can do, is something that is part of interpreting the Treaty.³¹

In other cases the Court has also decided whether consumers would be confused by a marking on a Mars bar wrapper saying “10% extra”,³² whether a label provides sufficient protection from unduly strong or weak alcoholic drinks,³³ and even what the German word “bier” really means (the Court was right – but it was still not an interpretation of the Treaty).³⁴ All of these cases concerned consumer protection, by far the most common value to be posed against free movement of goods in the *Cassis*-type context. To some extent that makes them special. Much has been written on the Court’s deliberate close control of factual issues in the consumer sphere, and some reasonable policy justifications for this provided.³⁵ Nevertheless, a high degree of control could also have been maintained by provision of carefully crafted principles.

Other areas of free movement show a similar approach. A notable non-consumer *Cassis*-type case concerned a Danish recycling scheme.³⁶ This inevitably imposed some burdens on importers, and the question was whether the environmental aims justified this. The Court reached a view that was at odds with most Danish opinion that specific aspects of the scheme were not necessary and so disproportionate. This can be understood as a controversial balancing of free trade against environment, but it can also be seen as a controversial assessment of how the scheme worked and which aspects were central to it – the facts.

²⁹ Case C-405/98 *Konsumentenombudsmannen v Gourmet International Products* [2001] ECR I-1795.

³⁰ See text to notes 14 and 15 above.

³¹ Factors influencing how far the Court chooses to go, such as the nature of the interests at stake, political sensitivity, and the importance of the question, are discussed in G.De Burca ‘The principle of proportionality and its application in EC law’ in (1993) *Yearbook of European Law* (OUP). That the Court of Justice in practice sees itself as having an optional competence to apply proportionality is also supported by Jacobs ‘Recent developments in the principle of proportionality in European Community Law’ in E.Ellis *The Principle of Proportionality in the Laws of Europe* (Hart, 1999) 1-21 at 19-20, T.Tridimas ‘Proportionality in EC law: searching for the appropriate standard of scrutiny’, also in Ellis (ed), 65-84 at 78-80, and J.Jans ‘Proportionality revisited’ (2000) 27 *Legal Issues of Economic Integration* 239-265 at 255-259.

³² Case C-470/93 *Mars* [1995] ECR I-1923.

³³ Case 120/78 *Cassis de Dijon* [1979] ECR 649.

³⁴ Case 178/84 *German Beer* [1987] ECR 1227.

³⁵ See e.g. S.Weatherill ‘the role of the informed consumer in European Community law and policy’ (1994) 2 *Consumer Law Journal* 49; Howells and Wilhelmsson ‘EC Consumer Law’ in Howells (ed) *European Business Law* (Dartmouth, 1996).

³⁶ Case 302/86 *Commission v Denmark* [1988] ECR 4607.

The Court has also been keen to engage with the arcania of the organization of sport. In *Bosman*³⁷ and *Lehtonen*³⁸ it enthusiastically rolled its shirt sleeves up to examine the football transfer rules and rules governing professional basketball respectively. During an immensely long judgment in the former the Court engaged with the purposes of the transfer rules, their effects on young players and the creation of a national pool of talent, as well as their financial consequences for clubs and players, before concluding that the transfer system went beyond what was necessary for the game. It was an interpretation of that system more than of the Treaty. In the latter case, somewhat similarly, the Court looked at the organization of professional basketball. However, this time, by contrast with *Bosman*, on one point, to do with different treatment for national and foreign players, it concluded that “it is for the national court to ascertain the extent to which objective reasons, concerning only sport as such or relating to differences between the position of players from a federation in the European zone and that of players from a federation not in that zone, justify such different treatment.” Clearly the facts provided to it there were not enough.

More examples could be taken from cases concerning the legitimacy of reliance on a Treaty exception. Among these the Court has decided for itself what English law says about pornography,³⁹ and the financial effect of free movement on the Dutch health service,⁴⁰ as well as what UK policy toward scientologists is.⁴¹ In at least two of these it was flatly wrong, and the third is endlessly debatable, an essentially economic and political question, and almost a textbook example of a question where the law cannot be applied rationally without extensive factual research.⁴²

Yet the most satisfying set of cases for the purposes here concerns selling arrangements. In early cases on these, when the Court still saw them as obstacles to movement, it had sometimes decided proportionality itself,⁴³ and at other times stated this was ‘a question of fact to be determined by the national court’.⁴⁴ However, that observation become almost redundant when in *Keck*, the Court seemed to find that selling arrangements are not obstacles to movement anyway – so proportionality would not need to be considered. Yet the judgment was, to put it kindly, nuanced. The Court stated that selling arrangements fell outside Article 28 only insofar as they had an equal effect on national and imported products. This proposition suggests a fact/law interpretation/application distinction.

The question is who decides when there is an unequal effect? This would seem to be obviously a matter for the national court. However, in a string of cases the Court of Justice implicitly rejected that, concluding despite evidence to the contrary that

³⁷ Case C-415/93 *Bosman* [1995] ECR I-4291.

³⁸ Case C-176/96 *Lehtonen* [2000] ECR I-2681.

³⁹ Case 34/79 *Henn and Darby* [1979] ECR 3795.

⁴⁰ Case C-385/99 *Müller-Fauré* [2003] ECR I-4509; Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473.

⁴¹ Case 41/74 *Van Duyn* [1974] ECR 1337.

⁴² See also Case C-112/00 *Eugen Schmidberger* [2003] ECR I-5659, where despite very abstract questions from the national court the Court of Justice chose to assess the facts and decide a very difficult socio-political point concretely.

⁴³ Case C-161/91, *Stoke on Trent v B & Q plc*, [1992] ECR I-6635; Case C-322/89 *Marchandise* [1991] ECR I-1027; Case C-312/89 *Conforama* [1991] ECR I-997.

⁴⁴ Case C-145/88 *Torfaen Borough Council* [1989] ECR I-3851.

there was no inequality of effect.⁴⁵ It seemed to be juridifying the concept, removing its empirical content.⁴⁶ Such a course of action is plainly at odds with the normal meaning of words – if effect is not a matter of fact what is? – and attracted great criticism.⁴⁷ Then in *Gourmet* it half changed its mind, finding, following an analysis of the particular market and circumstances, that the rule in question did have an unequal effect. Thus, this clearly is not an artificial legal question. Nevertheless, the Court decided the point, rejecting the Commission's view that it was for the national court to do so – it applied the law.⁴⁸

A second controversial proposition in *Keck* was that selling arrangements of equal effect do not prevent access to the market. On one reading this is fairly obvious; if the effect is equal and access was prevented then it would be impossible to sell domestic goods either. Only a very select group of rules would have this consequence. However, until *Gourmet* it was not clear that equal effect was to be understood in any realistic way. Equality 'in law and fact' seemed to be fairly formalistically assessed, with equality in law dominating. In that case, this second proposition is troublesome. To find that selling arrangements generally do not prevent market access is not just a finding of fact, but one that has been criticized as being simply wrong.⁴⁹ Thus, while the Court maintained a formalistic interpretation of the *Keck* proviso its view of the effects of selling arrangements could also be seen as a disastrous foray beyond the legitimate interpretation of Article 28 as prohibiting measures that prevent market access into the applicatory fields of deciding what kind of measures those are.

In any case, all of the above are merely indicative. The important point is that building judgments around the way national rules work and their consequences, discussing and deciding these, is the norm. There is no sense of a court whose competence is in any sense confined to the Treaty. Rather it is a merely a starting point. Indeed, throughout all these cases a particular technique often emerges. The Court does often state an abstract rule of law, but instead of stopping there, and letting the national court use this, it then proceeds to apply that rule to the facts, in the next paragraph or paragraphs. It may formally use the language of hypothesis, 'a rule such as', instead of 'this rule', but that difference is of no more than procedural significance.⁵⁰ In essence, it is applying the law.

4.2 Competition law

In competition law there are a higher proportion of direct actions brought by the Commission against undertakings, in which the Court is full function; it must fact-

⁴⁵ Case C-292/92 *Hünernmund* [1993] ECR I-6787; Case C-391/92 *Commission v Greece* [1995] ECR I-1621; Case C-69 and 258/93 *Punto Casa* [1994] ECR I-2355; Case C-418/93 *Semmararo* [1996] ECR I-2975. See also Case C-189/95 *Franzen* [1997] ECR I-5909 and Case C-34-36 *de Agostini* [1996] ECR I-4661, showing the first signs of a softening of the approach.

⁴⁶ C.f. Enchelmaier, op cit.

⁴⁷ See N.Reich 'The November revolution of the European Court of Justice: *Keck*, *Meng* and *Audi* revisited' (1994) 31 Common Market Law Review 459. See also S.Weatherill 'After *Keck*: Some thoughts on how to clarify the clarification' (1996) 33 Common Market Law Review 885; C.Barnard 'Fitting the remaining pieces into the goods and persons jigsaw' (2001) 26 European Law Review 35.

⁴⁸ See P.Koutrakos 'On groceries, alcohol and olive oil: more free movement of goods after *Keck*' (2001) 26 European Law Review 391-407.

⁴⁹ See S.Weatherill 'After *Keck*: some thoughts on how to clarify the clarification' (1996) 33 Common Market Law Review 885-906 at 894.

⁵⁰ It is part of a 'formalist fiction'. To take it seriously as reflecting a division of functions would be 'slavish formalism'. Nevertheless it is not without political importance. All from Cohen, op cit, at 422 and 433-4. Contra, see Snell, op cit.

find and decide the case. One would therefore expect that judgments under such actions would be more detailed and fact-oriented than those given on a reference. In fact such a difference is not always apparent. Whether the complaint of anti-competitive behaviour is being adjudicated before the Court itself, or before a national court, it often appears to treat its role as identical. *Bronner* is a particularly egregious example, in which there is detailed consideration of the practicalities of newspaper distribution in Austria, and conclusions are drawn about the economics of this, which are highly disputable.⁵¹ That case laid down the principle that a refusal to allow a competitor to use an ‘essential facility’ could be an abuse of dominance. The essentiality or otherwise of a facility turns on practical questions such as whether it could be replicated by the competitor. Investigation of that, one might think, is precisely what the reference procedure would leave to the national court. Not in this case.⁵²

Competition law is vulnerable to such an approach because of the increasing realisation that a sensible law of competition requires extensive economic and market analysis. Early law from the Court tended to treat matters of effect in an a priori way, issuing rulings on what constituted a restriction on competition that did not correspond to generally held views of the economic reality. As a result of intense criticism both it and the commission have gradually moved towards treating concepts such as ‘dominance’ and ‘restriction of competition’ as essentially factual, to be determined in conjunction with economists and industry experts.⁵³ This is currently widely considered to be a good thing for the quality of the regulatory regime and so for competition and European economies. However, it does have as a consequence that one would expect a significant transfer of applicatory competence to national courts. Yet, perhaps partly because most actions are direct, and so the Commission and Court are used to competition cases being centred on economic investigation, there sometimes seems to be no inclination to step back from it when the point arises on a reference.

Having said that, many competition references are answered in an abstract way, far more so than in free movement. One reason for this may be that competition cases often involve quantitative issues, and to deal with these on a reference might be impossible, and would be an extreme assumption of national competence; a step too far. It is where issues are factual, but qualitative, that the lines between competences become difficult and vague. Such situations are likely to occur where the law provides a framework for balancing values – such as in free movement and sex discrimination. Then law and fact are intertwined. Consistently with this, many of the competition references where the Court seems to go furthest involve abuse of a dominant position or public monopolies.

4.3 Taxation

A similar lack of difference between direct and reference actions can be seen in the law on Article 90, the prohibition of discriminatory taxation. Here there are a

⁵¹ Case C-7/97 *Oscar Bronner* [1998] ECR I-7791.

⁵² See also e.g. Case 395/87 *Ministere Public v Tournier and Verney* [1989] ECR 2565; Case C-179/90 *Merci Convenzionali Porto di Genova v Gabrielli* [1991] ECR I-5889; Case C-18/93 *Corsica Ferries v Corpo de Piloti del Porto di Genova* [1994] ECR I-1783; Case C-41/90 *Hofner v Macrotron* [1991] ECR I-1979.

⁵³ See Jones and Sufrin *EC Competition Law* (OUP, 2001) 495-504; Faull and Nikpay *The EC Law of Competition* (OUP, 1999) chapter 1.

number of cases discussing the concepts of ‘similar products’ or ‘indirect protection’ both central concepts in that article. Similarity, according to the Court, arises from a combination of objective characteristics and consumer substitutability. In many of the direct actions this has involved looking at, for example, the manufacture of particular drinks, their content and qualities, and how they are perceived and consumed in particular countries, in order to make a finding. In the rather smaller number of actions where similarity has arisen on a reference, the judgments read very similarly, with the Court asking, and answering, presumably on the basis of the file before it, the same questions. Analogous remarks could be made about protective effect.⁵⁴

4.4 Common customs tariff

What is sometimes cited as the most spectacular example of Court specificity is the case law concerning customs duties imposed on goods entering the Community.⁵⁵ This has resulted in judgments of great detail, in which the Court considers whether a soft cotton shirt with no collar, three buttons and pictures of sheep is to be seen as nightwear or leisure wear, and suchlike.⁵⁶ The policy surrounding this is particularly obvious; it seems clear that goods should pay the same duties whichever Member State they enter the Union through.⁵⁷ Nevertheless, this could be achieved by having particularly precise law – which to a large extent it is – and the argument that the Court exceeds its competence is the same as elsewhere. An alternative approach would be to specify in the Treaty that all customs questions are to be dealt with exclusively by the Court of Justice or the Court of First Instance, avoiding the division of functions that applies elsewhere, and effectively creating a single Community customs court.

5. THE DESIRE FOR UNIFORMITY

Before looking at the practical and principled problems raised by the Court’s broad view, it is worth asking why it acts as it does.⁵⁸ What are the reasons for folding application into interpretation and giving the Court control over both? There is a

⁵⁴ See e.g. Case 112/84 *Humblot v Directeur des Services Fiscaux* [1985] ECR 1367; Case 433/85 *Feldain v Directeur des Services Fiscaux* [1987] ECR 3536; Case 193/85 *Cooperative Co-Frutta* [1987] ECR 2085; Case 140/79 *Chemical Farmaceutici* [1981] ECR 1; Case 243/84 *John Walker v Ministeriet for Skatter* [1986] ECR 875; Case 45/75 *Rewe-Zentrale des Lebensmittel-Grosshandels* [1976] ECR 181; Case 216/81 *COGIS v Amministrazione delle Finanze dello Stato* [1982] ECR 2701.

⁵⁵ See H.Schermers and D.Waelbroek *Judicial Protection in the European Union* (Kluwer Law International, 6th edn. 2001) at 238.

⁵⁶ A quick survey of case law under the heading ‘common customs tariff’ reveals an abundance of examples. Simply to give a flavour; Case C-276/00 *Turbon International v Oberfinanzdirektion Koblenz* [2002] ECR I-1389 and Case C-259/00 *Biochem v Oberfinanzdirektion Nurnberg* [2002] ECR I-2461. See also cases cited in Schermers and Waelbroek, *ibid*.

⁵⁷ Which has caused one Advocate General to urge the Court – with success – not to feel nervous of the division of functions between courts and simply decide the case, such is the importance of customs uniformity – see Case 40/69 *Bollman* [1970] ECR 69. See also Schermers and Waelbroek, *ibid*.

⁵⁸ See generally on this J.Snell ‘European Courts and Intellectual Property: A Tale of Hercules, Zeus and Cyclops’ (2004) *European Law Review* 178-197, who takes an opposite view to that here. He makes two additional points, not discussed in the text above; that it is too difficult to formulate abstract judgments, at least in early cases – courts need time to feel their way to the principle (at 190). Also, he argues that the absence of dissenting judgments creates a need for consensus among all the judges, and this is much easier to reach on the result, and on a factual analysis, than on the underlying principle. Both are fair points, but it is suggested do not carry enough weight to change the conclusions reached here.

general argument about the nature of the Court to be made, which is worth sketching to provide a framework, an argument about the Court's role in the legal system, and then two more specific and legal arguments about preliminary references.

The general argument begins with Article 7 EC, which entrusts the Court, along with the other Community institutions, with the purposes of the Community. This creates an unusual situation for a court; rather than being a neutral arbiter between Community and Member States, as for example the American Supreme Court is between the Federal Government and the states, it is clearly encouraged to take sides. This is a sensitive point - one must be careful not to make unjustified accusations of bias – but it may well be fair to say that the Court does not conceive of itself in terms entirely analogous in their neutrality to its national equivalents. It does accept, to some extent, the Community mission, and that does influence its approach to the law.

Perhaps that is unfair; one could argue that all courts are partly entrusted with policy, in that they are entrusted with enforcing the laws designed to implement those policies. There is no strangeness in Article 7. Yet there does seem to be a difference in emphasis. The High Court, when it enforces the Financial Services Act, is achieving government policy in that area, but it would probably not imagine its obligation to that policy to go beyond the law, but rather to be entailed in it. It begins with the text, albeit that it may interpret that in the light of the policy. By contrast, the Court of Justice seems to begin with the policy goals, and then see what it can do with – or sometimes without - the text to achieve them.⁵⁹ In that light, the approach to preliminary references can be seen as just another example of purposive interpretation. It has licence to do whatever is necessary.

Such a licence might even justify an attempt to reform the whole legal system. It is sometimes argued that this is what the Court of Justice is trying to do. By intervening to a high degree in national cases, and giving full answers to questions, it is trying to break out of the limited reference procedure and recast itself in the mould of an appeal court, with full competence to decide the case. This move goes in parallel with the limiting of other, non-reference, means of access, notably the narrow interpretation of individual concern to challenge Community acts.⁶⁰ The ultimate destination is then a single path to a full-function Court, and its inauguration as the supreme court of Europe – at least where Community law is involved. This would be analogous to the role of the Federal Supreme Court in the US. The weakness of the argument is that many would see the Court as having that status already. On the other hand, clearly it could be seen – this paper argues - as having a more limited function, and if that is not the prevailing view, then perhaps that is an indication of the success of its expansionist strategy.

The specific arguments suggest why a broad approach could be seen as necessary. The least convincing of these can be dealt with shortly. It locates the explanation for the cases above in the way questions are asked. They tend to be phrased very concretely, and so, it can be argued, call for concrete answers. Defenders of the Court point out that 'national judges expect an answer to their question', and the co-operative relationship demands that it be given. This is unconvincing. If the Court provides abstract rules and tells national judges to work with them, there seems little reason to think they will not do so; it is after all the function of a judge to apply

⁵⁹ See L.Neville Brown and T.Kennedy *The Court of Justice of the European Communities* (Sweet and Maxwell, 5th edn. 2000) at 344, and Sir Patrick Neill, quoted therein at 322.

⁶⁰ C.f. Harm Schepel and Erhard Blankenburg 'Mobilizing the European Court of Justice' in G.De Burca and J.H.H.Weiler (eds.) *The European Court of Justice* (OUP 2001), 9-42 at 31.

rules, and no reason to doubt their capacity to do this. If, on the other hand, the Court, in its answers, also considers the facts of the case to an extent that essentially determines the outcome, then the clear message is that such consideration falls within its task, and so national judges will, correctly, continue to refer each new fact set to the Court. While national judges could break out of this spiral by a robust determination themselves of what is interpretation and what is application, this question itself is perhaps also one of interpretation, so that correctly, if the activities of the Court are to be confined, it is for the Court itself to make that clear; it cannot then blame national courts and their questions for the concreteness of its judgments.⁶¹

Indeed, there is no indication that it is unhappy with such concreteness, or is seeking to train national courts away from it.⁶² The Court has even ruled that questions are not acceptable where they do not contain sufficient factual background to enable it to assess the question in context. It has also ruled that it will not answer hypothetical questions, and Advocates General have urged it not to answer questions where the Community law in point is being applied outside of a Community law context – for example where national law and Community law use identical terms, and for the sake of a consistent interpretation the national judge wants to know what the Community law rule would mean. The theme in all these situations is that a question can only be assessed and answered in its full factual context, which is clearly only the case if the answer is to some extent dependent upon those facts.⁶³ It may be said that the Court sees its function as giving an interpretation of the facts in the light of the Treaty, rather than just an interpretation of the Treaty itself.⁶⁴

A much more important reason – indeed the determining factor in the use of Article 234 – is the well-known desire of the Court to achieve uniformity of Community law.⁶⁵ Abstract interpretations leave more room to the national court, and so create the risk that cases will be decided differently both from how the Court itself would do so, but also from court to court, or Member State to Member State.⁶⁶

This is certainly a real possibility. Yet from another perspective the uniformity argument is very problematic. On the one hand, it must be doubtful whether marginalizing the function of national courts is the right way to induce them to use Community law properly. In any case, even if they assent to centralization of the assessment of facts, can the Court of Justice really cope with the work? On the other hand, arguments for and against limiting the freedom of individual judges to interpret and apply the law in the case before them bring to the fore the different legal traditions of the Member States, and raise the question of whether Community law is more common or civil, and whether blending these two risks a loss of coherence. These two matters are the subject of the next two sections.

⁶¹ Although see Arnall's implicit point that an insensitive response to references could drive national courts to stop sending them; A.Arnall 'The past and future of the preliminary rulings procedure' (2002) *European Business Law Review* 183-191 at 185.

⁶² Indeed a trend towards more concreteness is identified by several writers. See H.Schermers and D.Waelbroek *Judicial Protection in the EU* (Kluwer Law International, 6th edn. 2001) at 239; P.Craig and G.De Burca *EU Law* (OUP, 3rd edn. 2002) at 378.

⁶³ K.Laenarts 'Form and substance of the preliminary rulings procedure,' in D.Curtin and T.Heukels (eds.) *Institutional Dynamics of European Integration* (Nijhoff, 1994) 355 at 358; G.Bebr, *Development of Judicial Control of the European Communities* (Nijhoff 1981) at 432.

⁶⁴ See note 12 above (Bengoetxea, McCormick and Soriano).

⁶⁵ See e.g. Case 66/80 *International Chemical Corporation* [1981] ECR 1191.

⁶⁶ See *Tridimas*, op cit, at 24.

6. CONSEQUENCES: CENTRALISATION, ALIENATION, AND JUDICIAL OVERLOAD

If interpretation includes assessing the facts, then any new fact set can be seen as requiring an interpretation of the Treaty. The idea that most new fact sets merely require an application of existing interpretations is sidelined. Thus the number of potential references is hardly less than the number of potential cases where Community law is relevant.⁶⁷ The potentially negative consequences for the workload of the Court of Justice are obvious. It is surprising in this context that much energy has been devoted to solving the problem of the Court's slowness via structural rearrangements, while it seems clear that almost no structure will enable it to cope so long as it maintains such a broad view of its competence. Indeed, if there are now considerably fewer references than there are cases concerning Community law, that is to a large extent because lower courts have a discretion to refer, and exercise that discretion with an eye on cost and time – so that the more efficient the court system, the greater the reluctance that one might expect to refer, leading perhaps to a new non-uniformity of Community law, arising because of the differing degrees of participation of the Court in the national caseload.⁶⁸ If, in the future, the Court of Justice were to become able to deal with cases quickly, as a result of one of the structural improvements so often discussed, then one could probably expect the number of references to increase until it was once again flooded. It seems very unlikely that it can ever escape overwork as long as maintains such a universal potential role.⁶⁹

Moreover, the references that do come are likely to be of little general interest – just repetitions of analytically familiar situations, solved without interesting reference to general principles.⁷⁰ Thus the Court's capacity to provide a unifying framework for the law is diminished. As well as this, each reference is clumsier and slower because dealing with it requires a much closer engagement with the facts – which the Court may not handle well.⁷¹

The question also arises of when exactly national courts should refer. In the case of courts of last instance this is reasonably clear, but in the case of lower courts, is the discretion absolute? Also, is that discretion to be exercised purely in the light of practical factors – cost and time – or is the difficulty of the point of Community law also something that must, as a matter of Community law, be taken in to account? In other words, are lower national courts allowed, or encouraged, to interpret

⁶⁷ Rasmussen, op cit, at 1108; Advocate General Jacobs in Case C-338/95 *Wiener* [1997] ECR I-6495.

⁶⁸ See T.Tridimas "Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure" (3004) 40 Common Market Law Review 9-50 at 17 and 37-38.

⁶⁹ C.f. the discussion of intensity of review as a tool for controlling workload, strict review operating as an intimidatory factor reducing references; P.Craig 'Community Court jurisdiction revisited' in G.De Burca and J.H.H.Weiler (eds.) op cit, 177-214 at 187-8.

⁷⁰ Perhaps this will change now that the Court's rules of procedure allow it to give a (quicker and simpler) reasoned order where the answer to a reference "may be clearly deduced from existing case-law" (Art 104(3) of the Rules of Procedure, OJ 2000 L 122/43). However that seems unlikely, since the Court's fascination with factual detail will probably lead it to focus on the uniqueness of each fact set, rather than the analytic familiarity of the problem.

⁷¹ See Case C-206/01 *Arsenal v Reed* [2002] ECR I-10273, noted by A.Arnull at (2003) 40 Common Market Law Review 753-769 and G.Davies at (2003) 28 European Law Review 408-417; Jarvis, op cit, at 186-189.

Community law themselves, or should they only not refer when the case calls for no more than a mechanical application of existing interpretations?⁷²

Clearly they do – and may – interpret to a considerable extent themselves. Indeed it is this very fact which makes it necessary to make references by final courts compulsory,⁷³ although this does create the paradoxical situation that courts of last instance are never allowed to use Community law in any creative or intelligent way, referring everything that is not blindingly obvious,⁷⁴ while lower courts have in fact much wider Community law interpretative powers. Yet at the same time it seems implicit in the organisation of the system that there is an interpretative quasi-monopoly in the hands of the Court of Justice. The emphasis on uniformity of outcome, and the purpose of the reference procedure as an aid to this, is only coherent if the idea is that interpretation is in fact centrally controlled. An additional argument in this direction arises from *CILFIT*,⁷⁵ in which the Court can be understood as stating that there are no clear points – thus implicitly all should be referred.⁷⁶

Thus national court interpretations of Community law, while sometimes creative and purposive, take place in a grey area of semi-legitimacy, a sort of tolerated but not approved practice, where the assumption seems to be that ultimately any points of law will in fact make its way to the Court of Justice. Moreover, national final courts have no interpretative competence at all.⁷⁷ This creates a difficult situation for the national judge. He has no obligation to refer, and if he chooses not to must then use Community law as intelligently as any other law, interpreting as necessary, but is also aware that his authority to do so is ambiguous. This must create an uncomfortable relationship with the law, which is likely to resolve itself either into defiance,⁷⁸ which may well lead to anti-Court interpretations, or a mechanical and unimaginative use of the law out of fear of crossing boundaries, which is bad justice, or in fact a reluctant referral of every point despite the cost and time involved. In other words national courts are alienated from Community law, and inhibited from good use of it. Nor do they have the chance to have their interpretations approved or disapproved; the Court of Justice does not examine prior national judgments in detail as a court of appeal would, so that there is no chance for them to build up a body of

⁷² For examples of the UK approach see Lord Denning in *Bulmer v Bollinger* [1974] 2 WLR 202, criticized in F.Jacobs 'When to refer to the European Court' (1974) 90 Law Quarterly Review 486 at 492, and Sir Thomas Bingham MR in *R v International Stock Exchange ex parte Else* [1993] QB 534 (all discussed in P.Craig and G.De Burca *EU Law*, {OUP 3rd edn. 2003} at 453-7). The irony is that this national court discussion of when a UK court should refer is in itself an interpretation of Article 234 that really merits a reference. Existing Court judgments on discretion to refer have been in the context of a decision *to* refer, rather than not to. Although the statements affirm lower court freedom, that context is importantly different. See e.g. Case C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535.

⁷³ Article 234 provides that while lower courts may, final courts *must* refer questions of Community law.

⁷⁴ Case 283/81 *CILFIT* [1982] ECR 3415.

⁷⁵ *Ibid.*

⁷⁶ Rasmussen, *op cit*, at 1092-3 but c.f. Tridimas, *op cit*, at 42-4. See also Arnall, "the over-all effect of *CILFIT* would be to encourage national courts to decide points of Community law for themselves. This could only jeopardise the uniform application of the Treaty", A.Arnall 'The use and abuse of Article 177' (1989) 52 Modern Law Review 622 at 626.

⁷⁷ See Cohen, *op cit*, at 438-444. Hence, perhaps, according to L.Neville Brown higher national courts cannot bind lower courts on points of Community law; L.Neville Brown, *op cit*, 379-381.

⁷⁸ C.f. Weiler's discussion of the 'compliance pull' resulting from formally allowing national courts to decide cases; Weiler, "Journey to an unknown destination: a retrospective and prospective of the European Court of Justice in the arena of political integration," (1993) 31 Journal Common Market Studies 417 at 422.

approved expertise in this way. They are, as has been noted, emasculated and infantilised.⁷⁹

This problem is exacerbated by the purposive nature of Community law. Using it correctly often requires a far more activist approach than national judges will be used to. In particular, proportionality assessments involve second guessing the legislator on the desirability and necessity of national measures, something the Court of Justice is comfortable with, but more conventional courts are not. Hence the evidence seems to be that national courts apply proportionality in disparate and often unsatisfactory ways, being generally less critical of national measures than the Court of Justice is or would be.⁸⁰ This could be seen as an argument for the Court's approach, showing that if it does not decide all cases uniformity is threatened (although in fact there could well be a fairly uniform approach throughout the Community – just a less Community-oriented one). However it can equally be seen as a result of that approach. By deciding each case in a common law way, on the facts, without principled explanation of what it is doing, the Court minimises the general usefulness of its judgments. It issues endless decrees that this measure is necessary and proportionate while that one is not, without explicitly unpacking its legal process to any extent. It does not, in short, explain in any detail exactly what proportionality is, and how it should be applied, beyond the basic three steps that every textbook contains. An abstract filling in of what is to be understood by 'necessity' or third-stage 'proportionality' and the processes that a national judge should go through to discover these, is precisely the sort of thing that could be seen as interpreting the Treaty and would be of great use to national judges that are not prepared to simply replace the legislators' assessment of what needs to be done in a particular aim with their own, but who would be prepared to follow a clearly defined and more law-like set of steps to review legislation.⁸¹

What this indicates is that the crossing of the boundaries of interpretation is not merely a usurping of the national court's function, but also undermines the Court of Justice's own; by becoming concrete, it fails to be general, and so does not give the guidance for which it is employed. It is the difference between, as the adage would have it, giving a fish, and teaching to fish.⁸²

7. CULTURAL ORIGINS

A picture of the reference procedure in purely pragmatic colours misses much. It, and the way the Court views it, are products of the practices and ideologies of the Member States. Looking through the lens of the civil law and the common law, as well as a comparison of the procedure with national cassation casts a gently illuminating light, not so much providing solutions to problems as highlighting the background to them.

⁷⁹ See P.Allott 'Preliminary rulings: another infant disease' (2000) 25 *European Law Review* 538-547 at 542-542; Rasmussen, *op cit*, at 1092; "the Court of Justice has tried by all means to prevent national courts from coming to Community maturity"; F.Mancini (noting the infantilisation, but approving it) "The making of a constitution for Europe," (1989) 26 *Common Market Law Review* 595 at 606. See also Cohen, *op cit* at 438.

⁸⁰ Jarvis, *op cit*, at 214.

⁸¹ See Jarvis, *op cit*, at 200; P.Koutrakos 'On groceries, alcohol and olive oil: more free movement of goods after Keck' (2001) 26 *European Law Review* 391-407 at 402; J.Snell 'True proportionality and free movement of goods and services' [2000] *European Business Law Review* 50-57 at 55.

⁸² "Give a man a fish and you feed him for a day. Teach him to fish and you feed him for a lifetime" (traditional)

The discussions below are not intended to represent the views of typical continental or UK (or Irish) lawyers. There must be few individuals, and there are certainly no systems, that are pure embodiments of the doctrine they hold most dear. Rather the common law and civil law have been merging and converging for centuries. Yet in all the resulting mixtures two sources of dogma can be identified, two concepts of the law and its function, and these idealised philosophies continue to be important in the explanations and justifications of each system. Considering the preliminary reference procedure from these perspectives, while it may not correspond to actual opinions held, may still help indicate how the streams of the common and civil law have come to reach a new and unique blend in the law of the Community.

7.1 A civil law view

Law and judgments are quite clearly separate in civil law doctrine, and the uniformity of law consists in the application of identical abstract rules in all courts. The interpretation and application of that law is decentralised to individual judges, who do not formally allow themselves to be influenced by how other judges are deciding similar cases.⁸³ Indeed, to do so could be seen as at odds with the idea of judicial independence. Yet that autonomous interpretation and application is not seen as threatening the uniformity of the law – since judgments are not law. The risk of unequal application of the law is minimised by appeals, and by a common training process for judges. A significant amount of the legitimacy of most civil law derives from acceptance of the institutions of the legal process.⁸⁴

A classical civil lawyer would not then see any risk to the uniformity of Community law in allowing national courts to apply it freely, and insofar as he was concerned by differing outcomes he might look to a solution in common educational processes – something that has a considerable academic following on the continent. He would be trying to create a common conceptual framework in the minds of lawyers, a common dogmatic system. His underlying vision is of law as abstract propositions, which might well lead to a view of its understanding and interpretation as a process of restatement in other, also abstract terms. Then he would be inclined to see the Court of Justice as often doing far more than merely interpret.

Yet the civil lawyer would come across a troubling paradox if this were not the case. If the Court of Justice were to provide abstract interpretations, then it would become a legislator. This follows because its answers are, necessarily if the Article 234 procedure is not to be comical, binding in the case. However, if its statements are general, then obviously they represent generally applicable propositions,⁸⁵ and given their binding nature, are essentially new laws.⁸⁶ The function of the Court would then be to lay down new rules within the limits of the Treaty, a function that is analytically indistinguishable from the function of a legislator that lays down new rules within the function of a constitution or rules of procedure. The only difference may lie in the tightness of those constraints, but in fact, as is well known, and as a glance at the language of the Treaty will show, the constraints imposes on the freedom of the Court

⁸³ See L.Neville Brown *op cit* at 368-9.

⁸⁴ See Lasser, *op cit*, at 16-22.

⁸⁵ See Cohen, *op cit*, 434-5.

⁸⁶ 'Abstract precedents' perhaps. See Snell, *op cit*, at 192. See generally on the Court and precedent L.Neville Brown, *op cit*, 369-381; Craig and De Burca, *op cit*, 439-445; Cohen, *op cit*, 434-8; Toth 'The authority of judgments of the European Court of Justice: binding force and legal effects', (1984) 4 *Yearbook of European Law* 1-77.

of Justice are, at most, not uncomfortably tight. In fact, in the sense that the Treaty gives the Court of Justice the monopoly on interpreting what its own powers of interpretation are, it is considerably freer than most traditional legislators.

Yet the concept of the court as rule-maker is one that is most alien and repugnant to civil law systems. The more civil they are, the more they hold fast to the doctrine that a court merely decides a case, it does not lay down new rules.⁸⁷ A purely interpretative function, where interpretation is understood abstractly, must be abhorrent to the civil law. Thus the paradox is that if Community law is to be seen as following in the civil law tradition, guided by its principles, and thus conceiving of law as abstract, then it is also alien to the civil law, because it makes its courts into legislators.⁸⁸

There are two ways out. One is just to shrug and accept that Community law is civil only in parts – although given the value placed on overall coherence in civil law systems, ‘partly civil’ is almost as troublesome a concept as ‘fairly unique’. Another is to ask whether the act of measuring facts against legal principles can also be seen as interpretation of those principles. If that is the case, then the meaning of the law – for interpretation is surely about discovering meaning – lies in the results of specific cases; but that is a reasonable working definition of the common law.

7.2 *A common law view*

The common law lawyer should therefore be the most comfortable with the Court of Justice. His traditional view, no doubted rooted in the bog of Anglo-Saxon common sense, that abstract rules determine nothing, and the law is only discovered by looking at what has been decided in individual cases, and proceeding by analogy therefrom, the inductive approach, will lead him to consider that the only sensible and meaningful way of interpreting a Treaty is simply to use it; to look at each case on its merits, make a decision, and leave posterity and lawyers to pronounce the principles which with time will surely emerge. Accordingly, one might expect little criticism of the Court’s methodology in English literature, and little there has been.

However, the common lawyer should still be unhappy with the division of functions, because his conception of interpretation is that it *is* application; the division of the two is precisely what he, if true to his stereotype, will reject as foreign and wrong.⁸⁹ For him, Article 234 of the Treaty, at least as interpreted by the Court, is incoherent. He is happy with the practice, but not the principle behind it.

For the common lawyer the issue is really one of quality. He wants a precedent, which requires a judgment containing a fully argued analysis of the facts.

⁸⁷ See Lasser, *op cit*, at 14-15; L.Neville Brown, *op cit*, at 368; Snell, *op cit*, at 192.

⁸⁸ Very civil countries, such as France, avoid this problem by having their higher courts give effectively yes/no answers, without argument or principle other than restatement of legislation. This may seem like an unfair description to the civil lawyer, but is very much how it looks to the outsider. However, the problem with this approach is that it does not translate; the only accountability a court experiences is through scrutiny of its judgments, and thus they must be complete and persuasive. Brief, formal judgments can only be democratically acceptable in a context where the court is seen as having such a high level of inherent legitimacy, and experiences such total public trust, that it does not have to explain its actions. This may be achievable in a tightly coherent society with a strong republican tradition of respect for institutions, but is not achievable in the less homogenous Community. See Lasser, *op cit*, for fuller discussion of this.

⁸⁹ “It is as clear as legal history can make it that interpretation apart from judicial application is impracticable; that it is futile to attempt to separate the functions of finding the law, interpreting the law and applying the law.” Roscoe Pound, *The Spirit of the Common Law* (Marshall Jones; Boston, 1921) at 179.

When the Court provides one of its simplistic descriptions of the effects of a measure on competition or free movement, it fails to give that. From his perspective it just looks like a second-rate court.⁹⁰

Thus he will be in a state of permanent frustration, and more than his civil law colleague will feel that Community law is permanently unclear, or in a mess. He is therefore likely to be a rich source of references. Given the lack of detail in Court of Justice judgments, he is likely to find again and again that there is insufficient precedent to decide his case. Of course, he may find the national court interpretation acceptable, but he will rarely find a reference inappropriate. Whereas his civil law colleague may really wonder what the merit is in asking for yet another repetition of the same old principles, the common lawyer will see the uniqueness of his set of facts, and thus the potential of a new question for the Court. The common lawyer, if the same robust sense that gave him the common law did not also incline him to a respect for considerations of cost and time, could be a dangerously rich source of workload.

7.3 Comparing with domestic reference procedures

Blurring law and fact is not unique to Community law. It occurs to varying extents in national reference systems as well, despite their adherence to a similar interpretation/application division of functions. Yet the problems arising seem to be somewhat less, to judge by the stability and wide acceptance of those systems. Although the structure has been transplanted, it looks as if the new context makes different demands, and there are features of the Community system which impose stresses that do not arise nationally.⁹¹

One of these is the lack of competence of the Court of Justice to interpret national law.⁹² An important difference between similar national procedures and the Community one is that the national court of cassation or constitutional review will be competent to interpret all aspects of the law before it. Where a statute may conflict with the constitution, it is competent to authoritatively determine what the constitution requires, but also what the statute means. By contrast, the Court of Justice does not have competence to interpret national law. If the question referred to it concerns a possible conflict between national and Community measures, it must – or should – accept the national court’s assessment of what the national law says and means. This follows partly from attribution; the Treaty allows the Court of Justice to interpret the Treaty, but says nothing about it interpreting conflicting national measures. It is also a matter of common sense. Context is important to interpretation, and given the diversity of legal systems in the Community the most authoritative view on what national law says and entails must come from the courts of the system where it resides. The Court of Justice lacks the relevant experience and knowledge to come to an adequate assessment. So unlike the national context, which enables legal points to be fully handled by the higher court – and so also allows for the highly specific and terse judgments of the French Courts, which avoid the problem of legislating through

⁹⁰ According to L.Neville Brown a particular complaint of common lawyers, accustomed to an adversarial system, is that the Court frequently adjudicates on points that were not argued before it (L.Neville Brown, *op cit*, at 402-403). If so, that will no doubt only reduce the quality of judgment of such matters. See also Lasser, *op cit*, at 52-55.

⁹¹ Also political and organisational features; see Lasser, *op cit*, at 36-38 and 47.

⁹² *Information note on references by national courts for preliminary rulings*, issued by the Court, at paragraph 3 (available on the Court’s website); Case 75/63 *Hoekstra* {1964} ECR 177.

abstract answers⁹³ - the Community system makes the answering of questions of Community law a co-operative venture, in which the resources of the courts on both sides of the reference are necessary.

Another factor is that national systems all have some form of docket control in place, which prevents reference becoming an unreasonable centralisation of decision making.⁹⁴ In some cases, such as with the German Constitutional Court, only questions of a certain type, constitutional questions, are referred. Most court cases do not involve constitutional issues, and so this narrows the range of possible references. By contrast, while Community law can certainly be compared with an emerging constitution in academic argument, it is far more broad-ranging than most constitutions, now embracing issues of trade, social policy, and even crime, often on a detailed and technical level. Referring points of Community law entails referring points from a far greater group of domestic legal actions. When one considers that the source group for references is the whole community, and thus far greater than within a single nation, it is apparent that the demands made on a constitutional court with a reference procedure are not comparable to those potentially made on the Community court. Other systems, such as the Dutch and French, use cassation for appeals on any point of law, thus do have the broad range of reference. However, they do this on appeal, so that there is already a judgment in place.⁹⁵ This must reduce the impetus to go to cassation. Not only does the presence of a judgment give a certain finality - most cases are not appealed; most judges are right most of the time - but this tendency is reinforced by the fact that the national judge in interpreting national law has an authority that the national judge interpreting Community law does not. Even if a national court has issued a judgment, and the question of a reference comes up during an appeal against that, so that the reference can be seen as essentially an appeal against the earlier national interpretation of Community law, the motivation for such a reference is greater than the motivation to an equivalent appeal to a national court of cassation on a point of national law in proportion to the extent that national judges are seen to be masters of national law more than of Community law. Their view simply does not count for as much in the Community law context - and, it is suggested, they are more likely to be wrong.

Finally, the need for clear divisions of function in the national processes is not as great within the Community system, not merely for functional reasons, but for political ones. Who assesses and interprets the facts, the lower court or the court of cassation or review, is neither a question of subsidiarity, politics, nor national autonomy when the procedure is domestic. There is no question of local legal culture and practice being misunderstood, nor of foreign values being imposed. In short, all the reasons which led to the need for division of functions in the Community context are absent.

7.4 The Community blend

Although structurally the Court owes most to French law, it has never adopted the very abbreviated style characteristic of higher courts in that system.⁹⁶ Rather, for understandable reasons, it has chosen to adopt a relatively discursive, explanatory,

⁹³ See note 88 above.

⁹⁴ See Snell, *op cit*, at 184-185.

⁹⁵ *Ibid*, especially the point that a decision on cassation is easier than one on a reference, because much of the work of factual analysis and organization is already done in the lower court's judgment.

⁹⁶ Lasser, *op cit*, at 36. See note 88 above.

educatory style, and to create precedents, examples, and to root law in fact and outcome rather than abstractions. This is part of an attempt to create the certainty and consistency and clarity that is the strength of common law/precedential systems. It also allows the incremental, reactive change that is another of their virtues.

Yet the common law is also unwieldy and labour intensive. It works because it is a collective enterprise, in which courts at all levels share the task of developing the law, and there is a multi-directional, constant, dialogue between them all, through precedent and the art of distinguishing. This multipolarity gives it its organic, evolutionary and incremental character, and provides the manpower to build up the dense network of implicit rules that are its key.

One court cannot do all that, and should not do all that. The common law spirit demands more dialogue and response. In the Community context we may call it subsidiarity, but if law is to be made by courts then national courts must also have a role in the development of the whole. It is the Court's failure to develop a conceptual framework that allows this, while still preserving its role as the unifying force that any supreme court must be, that stops Community law either taking root, or developing the richness of jurisprudence that it might. It denies others a role, without being able to fully fill that gap itself.

8. REGULATORY COMPETITION BETWEEN LEGAL SYSTEMS

The parallel between the judicial division of competences and the analogous division in positive law-making is striking. Also there, the Community interprets its own competences almost open-endedly. It is not that it leaves nothing to the Member States, but that their activities are conditional; there is no guarantee that the Community will not act in the same sphere, and take precedence.⁹⁷ Thus in reality, almost all competences are shared. This was strikingly evidenced in the proposed constitution, where after some doctrinal wrangling it was realised that the internal market could only be seen as a shared competence.⁹⁸ Yet the internal market is itself hardly well defined, touching on almost every area of life.

In the judicial sphere it is perhaps harder for the Community to invade national powers. The national court initiates, and so in a sense is the master of the reference procedure, and also of the case in which it takes place. The Court of Justice is not in a position to directly prevent this; ultimately national courts could always fight back. Yet courts are obedient, and one cannot expect a duel. In practice, if the Court defines away the national court role in Community law, it is likely to achieve this result.

This disturbs the broader functioning of the Community and the internal market. Even though the desire of the Community not to limit itself is consistent with its purposive and changing nature, and ambiguity has been a traditional and sometimes constructive tool in the integration process,⁹⁹ the uncertainty it causes also

⁹⁷ Leading to the possibility of spreading Community powers. Dashwood comments 'we have to rely on the Court of Justice to hold the line' A. Dashwood 'The Limits of European Community Powers' 1996 (21) *European Law Review* 113-128, at text to footnote 27. See also Weatherill 'Competences' *op cit*, and Davies 'The post-Laeken division of competences' (2003) 28 *European Law Review* 686-689.

⁹⁸ See Article 13 of the draft constitution, available via www.europa.eu.int.

⁹⁹ See generally on this K. Alter *Establishing the Supremacy of EC Law: the Making of an International Rule of Law in Europe* (OUP, 2001).

functions to inhibit the creativity and dynamism of the Member States, and so ultimately of the Community itself. Centralisation is not good resource management.

In the jargon of the time, the consistent tension is between regulatory competition, subsidiarity, and the virtues of local democracy, on the one side, and uniformity on the other.¹⁰⁰ Obviously a balance is necessary. However, to achieve this balance a degree of protection of the more vulnerable national level is necessary. That means, in this context, a principled division of functions between courts. At the moment, local autonomy is a refugee, without legal home. National courts have no intelligent part to play in Community law. Yet given the low standard of much of the Court of Justice's self-expression (no doubt a language problem) and the need in an integrating Europe for legal systems to understand each other better, and the need for the law itself to adapt to the environment in which it finds itself, this rejection of national judicial resources is a waste.

In the internal market this is particularly the case. Courts and legal systems are of great importance to economic activity, and their efficiency influences economic success. They could, in consequence, be seen as possible arenas for competition, and Community law would provide a mechanism for containing this within a common framework, preventing it becoming a race to deregulate, but rather becoming a race to administer the law well. Thus same principles would be applied in different courts, and efficiency and quality of interpretation would be factors influencing location and behaviour of economic actors, and so determining success in the market for law. This is a fascinating, and no doubt economically desirable, chance to explore empirically the merits of different systems – a sort of laboratory experiment in which Community law provides the common element placed in a diversity of circumstances. For Europe as a whole it is a chance to negotiate its way slowly towards a court system, perhaps a common courts system, that combines the best of them all, and results in efficient regulation of the Union as a whole.

9. REFERENCE V APPEALS

A simple reference procedure is not the right one for the Community. It is far too centralising, and can only function if answers are abstract. Yet in a Community with such cultural differences abstraction may not be enough to ensure sufficiently uniform application. Moreover, as Community law spreads into ever new areas the concept of the reference becomes ever more insulting; it is as if a national judge was told that he had better ask advice whenever a point of contract, criminal law, tort or property law arose, and not just decide it himself. A logical step is to move to an appeal structure. Much has been written on this,¹⁰¹ so discussion here is confined to advantages and disadvantages relevant to the topic in hand.

It would not be necessary to put the Court of Justice at the end of the appeals process, after all national remedies have been exhausted. Appeal could be possible at

¹⁰⁰ See C.Barnard and S.Deakin 'Market access and regulatory competition' in Barnard and Deakin (eds.) *The Law of the European Single Market* (Hart, 2002); N.Bernard 'The future of European economic law in the light of the principle of subsidiarity' (1996) 33 *Common Market Law Review* 633; N.Reich 'Competition between legal orders: a new paradigm of EC law?' (1992) 29 *Common Market Law Review* 961.

¹⁰¹ See generally Rasmussen, *op cit*; Craig, *op cit* at 201-204; the Court's own paper on *The future of the judicial system of the European Union*, available on the Court's website; the *Report by the working party on the future of the European Communities' court system* (January 2000) compiled for the Laeken convention; Allott, *op cit*, at 545.

any stage after the first judgment – or perhaps after the first appeal.¹⁰² However the key point would be the appeal would be from a decision, and the Court of Justice would be expected to review and approve or disapprove that decision. This could be – it is suggested should be – in a cassation form, where the Court would not provide a replacement judgment, but confine itself to indicating where things had gone wrong, and referring the matter back to the national court for redecision.

The advantages are several. Firstly, Community law is always interpreted and applied in full by national courts first, providing quicker use of the law, and giving national courts practice. Secondly, that national use of the law is then reviewed by the Court of Justice, thus providing feedback to the national court, but also information on the law, and on the behaviour of their peers, to courts in other Member States, something that will encourage cross-border legal communication and convergence of interpretations.¹⁰³

The function of the Court of Justice would be largely the same; it would consider points of Community law. Thus the same questions of interpretation and application, and abstraction and concreteness could arise. However the role of national courts would be made more central to the system and this would render the respect for these lines less vital. Moreover, if forced to build its judgments around those of the national court, to respond to them, the Court of Justice would find it harder to impose its own view of the facts. Thus national courts' control of their proper domain would be strengthened. The power of the first word, and of the full explanation, is considerable.

At the moment it is also the case that references often come to the court at a stage of proceedings where national judgments have been given. However, the Court rarely considers these in any depth. It responds far more fully to the arguments of the parties and the Commission – although not always to these. It clearly feels that these have something to contribute to the adjudication, where its judicial colleagues in the Member State do not. That perception would have to change on cassation.

The disadvantage of appeals, it is sometimes said, is that it would damage the co-operative relationship between courts and replace it with a hierarchical one. This seems somewhat unrealistic. The very limited amount of challenge that the Court of Justice has experienced over the years, despite its purposive and sometimes incoherent rulings, suggests that national courts do already treat it as their hierarchical superior within the realm of Community law, and indeed it is that. An appeal structure would be a more honest reflection of how things already are.¹⁰⁴ Nor would it threaten the ability of national courts to decide cases, at least if appeal was by cassation, or the dominance of national courts over national law. The Court of Justice would simply remain, as it is now, the last word on points of Community law.

10. CONCLUSION

This paper is not a call for abstract judgments as such. It is more a taking note of the fact that very concrete judgments and a reference procedure are a bad combination. Part of the solution to that should lie in less concreteness – the Court must learn to

¹⁰² See Rasmussen, *op cit*, 1104-1107; Craig, *op cit*, at 196.

¹⁰³ Cohen argues that appeal is clearly a much more effective way to achieve uniformity of law, and the only reason a reference procedure was chosen instead was political sensitivity, Cohen, *op cit*, at 444-5. See also S. Weatherill 'Can there be common interpretation of European private law?' (2002) 31 *Georgia Journal of International and Comparative Law* 139-166, at 162-166.

¹⁰⁴ Rasmussen, *op cit*, at 1102. See also Tridimas, *op cit*, at 36; Cohen, *op cit*, at 436.

trust and let go a little, not just in the cause of decentralisation, but also in its own cause of teaching national courts to use Community law. The time when leading by the nose was appropriate, if that ever was, is past.

However, there is also much to be said for the common law habit of discovering law in the facts, and rendering the story prior to the principle. It is the story that makes the law clear to non-lawyers, renders, if enough stories are told, the outcomes of cases certain, and also makes judges and courts accountable. Thus there should also be a role for a Supreme Court of Community Law that can review judgments, or judge cases, as a whole, and is not confined to the Treaty text. Certainly the tendency of the Court of Justice to treat its jurisdiction over the cases referred to it so broadly indicates that it hungers for full involvement. Then the task is to allow that involvement in a way that does not deprive the involvement of the national court, that also allows them to interpret and part-own Community law.

Fears of loss of unity if changes are made are probably exaggerated. There is already no control over what happens in courts that choose not to refer, and while the Court's style gives it much control over those who do, its lack of generality minimises the broader impact of its judgments. A different approach would increase uniformity in some ways, decrease it in others, and probably have no apocalyptic effect.

What it would do is chime with the direction of the Community and of law generally. The choice to make directives the major legislative tool, as well as the increasing attention given to complex and often troublesome matters like closer-co-operation, minimum harmonisation, and the use of framework directives are all signs of the recognition that there cannot be absolute uniformity for all. A single homogenous legal system is neither desirable nor practical. In these solutions a choice is made to opt for a common framework of principle, and then to allow divergence and diversity within defined bounds.

So is it with a more abstract approach to interpretation, and a system of cassation. The real work is left to national courts, and the Court functions rather like the European Court of Human Rights, perhaps sometimes laying down an important new principle, but often simply supervising the margin of appreciation.

Many words could be picked to summarise all this; subsidiarity, or regulatory competition, or efficiency in the use of resources. However, the key element is decentralisation. The Court's current behaviour is profoundly centralising. Yet it sits now not as sole owner and operator of an additional and confined legal system, that it may legitimately monopolise, but at the centre of a whole new multi-faceted European legal order. It needs to ask itself how much of the function of that order can reasonably be centralised in a single court.

Certainly, if it wishes to be seen as a true constitutional court, with the status and respect that are often accorded to these, then self-restraint will be a far more effective path than un-legal policy-led ad-hoc interventionism. Just as a central function of constitutions is to allocate power, a central function of constitutional courts is to protect that allocation, even at the cost of sometimes denying their own role and influence. They must not be concerned purely with substantive policy, but also with the system they protect, and the rights of other players in it. Thus they must be ready to deny themselves power to rule, to decide not to decide, where the constitution gives that power to other courts – even if, precisely when, those other courts may decide differently. It is concern with such questions, and the readiness to self-denial that must go along with it, that makes them constitutional.

Finally, one should place the Court in the context of the times. This is an age of movement away from hierarchy and central control, towards local autonomy and

individual freedom. There is little market for control any more, but rather for empowerment. Management, of individuals, groups, companies, and countries, is achieved more by manipulation and ideas, and less by compulsion. As in society, as in economics, so in law.